Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-003455
EA/15426/2021

THE IMMIGRATION ACTS

Heard at Field House
On 25th November 2022

Decision & Reasons Promulgated
On 29th December 2022

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR FATION GJERA
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the appellant: *Mr P Georget*, Counsel, instructed by Malik & Malik solicitors
For the respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal by the respondent, as she was before First-tier Tribunal, referred to from now on as the 'Secretary of State', against the decision of First-tier Tribunal Judge Pears (the 'FtT'), promulgated on 7th June 2022, by which he allowed Mr Gjera's appeal (referred to as the 'Claimant' for the remainder of these reasons) against the Secretary of State's refusal of his application for settled status under Appendix EU of the Immigration Rules.

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That decision, dated 12th May 2021, had in turn, refused the Claimant's application dated 12th January 2021, on the basis that the Claimant had not provided sufficient evidence, as a durable partner of his EEA sponsor, that he had been issued with a family permit or a residence card under the Immigration (EEA) Regulations. The decision did not refer to any human rights, for the purposes of article 8 ECHR or otherwise, nor did it require the Claimant to provide a statement setting out grounds on which he should be permitted to remain in, and not be required to leave the UK, pursuant to section 120 of the Nationality, Immigration and Asylum Act 2002.

The FtT's decision

2. The Secretary of State was not represented at the hearing before the FtT. The Claimant's representative relied on a detailed skeleton argument, in which he asserted, amongst other things, that the decision was not in accordance with the Withdrawal Agreement. He also argued that the refusal of EU settled status engaged with and breached, the Claimant's rights under article 8 ECHR. He sought to distinguish Amirteymour and others (EEA appeals; human rights) [2015] UKUT 004766 (IAC), although I have also considered Amirteymour v SSHD [2017] EWCA Civ 353. He submitted that Amirteymour did not apply, because his application had been under Appendix EU of the Immigration Rules, not the EEA Regulations. The Secretary of State's policy was to treat applications made under the Immigration Rules as human rights claims. Applications under the EU Settlement Scheme should be treated in the same way. The grounds further asserted that the human rights claim did not constitute a new matter, within the meaning of Mahmud (s.85 NIAA 2002 - 'new matters') [2017] UKUT 488 (IAC) as there was no new factual matrix within the appeal to be considered. The Secretary of State ought to have considered that an Appendix EU application would involve a decision which affected the Claimant's right to respect for his family and private life. Moreover, the Secretary of State's policy (EU Settlement Scheme, version 15.0, dated 9th December 2021) provided a so-called 'grace period' (1st January to 30th June 2021) within the Claimant had applied.

3. In the reasons for his decision, the FtT recited the Claimant's submissions. No Presenting Officer attended on behalf of the Secretary of State, so the FtT relied solely on the refusal letter as the basis for her case. In reciting the Claimant's submissions, the FtT referred at para [11] to a 'Schedule of Issues' from the Claimant's Counsel's skeleton argument. The wording is not precisely the same as the FtT skeleton argument in the bundle before me. It states:

> *"The Appellant asserts that that he is a family member of an EEA national and/or a durable partner. It is submitted that the decision engages Article 8 of the European Convention on Human Rights. Paragraph 5 of the introduction of the Immigration rules has been deleted. Therefore, it is submitted that decisions under Appendix EU of the Immigration Rules are susceptible to appeal under article 8 of the ECHR. I should note that the*

Appellant served a section 120 statement raising Article 8 family life and private life]" [Square brackets in original].

4. The FtT included the passage in square brackets, which was not in the skeleton argument.

5. The FtT's recitation of the law was brief. At para [12], he noted that the Claimant must show on the balance of probabilities that the requirements of Appendix EU are met. The Respondent's decision was on a narrow basis of whether the Claimant was a durable partner of an EU citizen exercising treaty rights. There was no conclusive definition of "durable partner" within the Appendix save the couple having lived together in a relationship akin to a marriage or civil partnership for at least two years (unless there was other significant evidence of the durable relationship) or that there was evidence provided by the Claimant that the partnership was formed and was durable before 30th December 2020. At para [12], the FtT did not refer to the absence of sufficient evidence, for example, a family permit.

6. The FtT went on to find, at para [13], that the Claimant and his partner couple began their relationship in September 2019, began living together in April 2020, and had been in a durable relationship since then. They were engaged to be married in May 2020 and had booked a marriage ceremony on 15th December 2020 but were unable to marry until 19th September 2021 because of Covid restrictions. On 9th February 2021, the Claimant made the EUSS application, as a durable partner of an EEA national. The Secretary of State refused the application on 12th May 2021, but the decision was not communicated until the Claimant received it on 2nd November 2021. The FtT noted that the Claimant had made his application during the 'grace period'.

7. The remainder of the FtT's analysis and conclusions were brief:

> *"14. I find having heard the evidence of 4 individuals and reading the documentation there is other significant evidence that the Appellant was and is the durable partner of Ms Sych at the relevant time.*
>
> *15. In relation to Article 8, if that is relevant, I adopt the reasoning of the Appellant's counsel."*

The grounds of appeal and grant of permission

8. The Secretary of State lodged grounds of appeal which are essentially as follows: the FtT erred in misapplying the terms of the Withdrawal Agreement, because the Claimant did not have a 'relevant document', as evidence that that his residence had been facilitated under the Immigration (EEA) Regulations. His application therefore fell outside article 10 of the Withdrawal Agreement.

9. The FtT also erred in concluding that the couple's relationship was durable in circumstances where their relationship had subsisted for barely 10

months at 31st December 2020, whereas there was a two-year requirement under the relevant provisions of the Rules.

10. First-tier Tribunal Judge Dixon granted permission on 29th June 2022. The grant of permission was not limited in its scope.

<u>The hearings before us and the amendment application</u>

11. The first hearing to consider whether that the FTT erred in law took place on 14th September 2022. At the beginning of the hearing, the Secretary of State's representative, Mr Whitwell, indicated that the Secretary of State wished to apply to amend her grounds. In light of the lateness of the application, it might necessitate an adjournment, in the event that the Claimant's representatives were not able to respond today. Mr Georget apologised for the late filing of the Rule 24 response, which had been filed and served the evening before the hearing, which he explained was in the context of a change of solicitors. Paragraphs [5] to [8] of the Rule 24 response stated:

> "5. FG is driven to accept, in the event that the Tribunal considers itself bound_to follow the recent decision in <u>Batool & Ors (other family members: EU exit)</u> [2022] UKUT 219 (IAC) and <u>Celik (EU exit, marriage, human rights)</u> [2022] UKUT 220 (IAC), that he cannot rely upon the Withdrawal Agreement or the immigration rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020 (Batool). FG would therefore seek to preserve his position and simply state for the record that, in his submission, Batool and Celik were wrongly decided on that point.
>
> 6. There is a further short matter in this appeal, however. In this case, FG had served a response to a s.120 notice raising article 8 ECHR. There was therefore also a human rights ground of appeal before the FTT by reference to article 8 (Batool at [78]). The FTT correctly notes this at [11] when recording the appellant's submissions (see the third paragraph under "(C) SCHEDULE OF ISSUES"), and the appeal was allowed alternatively on article 8 grounds, the FTT having adopted those uncontested submissions [15].
>
> 7. FG's simple point is this. The SSHD has not sought, nor was she granted, permission to appeal against that part of the FTT's determination allowing FG's appeal on article 8 grounds. There is no mention at all of article 8 in the grounds dated 14 June 2022, which focus exclusively on challenging the FTT's determination of the grounds of appeal by reference to the residence scheme immigration rules and the Withdrawal Agreement. There is therefore no challenge before this Tribunal in respect of the article 8 decision.
>
> 8. Accordingly, in the absence of any challenge to that part of the determination allowing the appeal on article 8 grounds, FG would invite the Tribunal to record that it stands."

12. The gist of the Secretary of State's proposed amendment, which Mr Georget submitted should properly be in writing and which Mr Whitwell

indicated that he was happy to provide, was that the FtT's decision in relation to article 8 ECHR had proceeded on the assumption that the Secretary of State had issued a section 120 notice. The Claimant could not rely on a purported 'reply' to a section 120 notice, where no section 120 notice had been issued. The Secretary of State had not consented to the article 8 issue being considered as a new matter. The latter could not be the case, as there had been no representative at the FtT hearing. The consequence of this, applying Amirteymour, which Mr Whitwell said ought to be applied, was that the FtT did not have jurisdiction to consider an article 8 appeal at all. Mr Georget indicated that he did not have instructions on whether a section 120 notice had been issued. Relying on the well-known authority of AZ (error of law: jurisdiction; PTA practice) Iran [2018] UKUT 00245 (IAC), he argued that it was not simply open to this Tribunal to entertain new grounds on any issue and not without a proper application.

13. In the circumstances, the Upper Tribunal regarded it as appropriate to adjourn the 14th September hearing, pending such a written application which, for the avoidance of doubt, we had not yet granted.

14. Following the hearing, this Tribunal issued directions for the Secretary of State to file and serve her application to amend the grounds of appeal. We directed that the application should include an explanation for why the additional ground had not been raised originally, and the substantive amended grounds on which the Secretary of State now sought to rely. The Claimant was to file with his response any evidence that a section 120 notice had been issued, or if no notice had existed, an explanation for why its existence was apparently asserted before the FtT and that assertion has been maintained. We directed that the application would then be referred to this Tribunal, to consider the application and decide the appeal on the papers unless either party sought a further hearing. The parties made further representations, and in light of the complexity of the issues, this Tribunal regarded it as appropriate for there to be a resumed hearing.

The Secretary of State's application to amend and the Claimant's response

15. On 23rd September 2022, the Secretary of State applied to amend her grounds. The author of the application was unable to explain why the original grounds of appeal had not challenged the reference to the section 120 notice or taken issue with the FtT's jurisdiction in a human rights claim, as the author of the original grounds had since retired. The Secretary of State relied on the later receipt of the Claimant's Rule 24 response, which had been sent shortly before the hearing to an incorrect email address, resulting in Mr Whitwell only receiving the Rule 24 reply, a matter of minutes before the adjourned hearing on 14th September 2022. The Claimant's purported reply to the section 120 notice appeared to have been unilaterally generated, rather than in response to a genuine notice. The issue of the Claimant's right to respect for his family life for the purposes of article 8 ECHR, clearly amounted to a new matter, as per the

authority of Celik. The Secretary of State had not considered the Claimant's human rights, nor had she issued a section 120 notice, or consented to the human rights claim as a "new matter." Such an error was obvious, by analogy to R (Robinson) v SSHD [1997] EWCA Civ 3090 and the Upper Tribunal was entitled to consider the issue of its own motion. Mr Whitwell followed this up with an email dated 4th November 2022, (albeit not in the form of a witness statement), in which he stated:

> "The SSHD can confirm that having checked her systems being ATLAS, HOPS and CID that no s120 notice has been generated for this Appellant.
>
> In EEA appeals it is the SSHD's normal practice to have these contained in the body of the Decision Notice if one is considered appropriate, and you are invited to note its absence in the RFRL in the instant appeal.
>
> Finally and for completeness I attach a blank s120 Notice for comparison purposes only between the document appearing in the Appellant's Bundle. This is not an invitation to the Appellant to file and serve any additional grounds of appeal.."

16. The Claimant opposed the Secretary of State's application. The Claimant first referred to the delay in the Secretary of State's application with 84 days between 21st June 2022 and the morning of the error of law hearing on 14th September 2022. The Claimant's response document, dated 11th October 2022, went on to state:

> "8. Pursuant to those directions, FG's current representatives (Malik & Malik Solicitors) made enquiries with both counsel who represented him in the FTT (Mr Michael McGarvey) and with the firm of solicitors understood to have been on the record as representing FG before the FTT (Wimbledon Solicitors). They have so far received a response only from Wimbledon Solicitors. That response was received by email dated 7 October 2022 and states that Wimbledon Solicitors did not submit a section 120 statement on FG's behalf (see response attached).
>
> 9. In the light of those enquiries, FG's current representatives unfortunately cannot assist the Tribunal any further as regards the information requested at para 3 of the directions. They have not been able to obtain a copy of any section 120 notice issued by the SSHD to FG, and they cannot confirm who exactly filed the section 120 response contained at p401 of the hearing bundle (despite observing the information appearing at p402 which apparently contradicts the response received).
>
> 10. FG's current representatives are therefore not in a position to provide evidence of a section 120 notice in this case, nor to assert positively that a section 120 response was properly made pursuant to s.120 of the 2002 Act.
>
> 11. To the extent that that assertion was previously made in written submissions dated 12 September 2022, that was made on the assumption that the section 120 response contained at p401, and

which was before the FTT, was properly made, an assumption which, it appears, was also made by the First-tier Tribunal Judge.

12. If that assumption turns out to have been mistaken, counsel sincerely apologises and emphasises that he wrongly made that assumption and had no intention whatsoever to mislead the Tribunal."

17. The Claimant submitted that he should not be put to proof of whether a section 120 notice had been served. The FtT had found, as matter of fact, that: "*the Appellant served a section 120 statement*," and if the Secretary of State was alleging an error of fact, it was for her to adduce relevant evidence. No such evidence had been induced and it was the Secretary of State's appeal. Any attempt to blame the Claimant for the delay in taking issue with the FtT's jurisdiction, because of the late submission of a Rule 24 reply, ignored the Secretary of State's duty to formulate her grounds of appeal, in response to the FtT's decision. There had been no good reason why this Tribunal should extend time and admit the new ground of appeal. The FtT's reasoning was adequate, in recording the Claimant's representative's submissions, which the Secretary of State had not opposed, as she had chosen not to be represented at the FtT hearing.

Submissions at the 25th November hearing

18. Mr Georget's submissions, of which I summarise the gist, included reliance on SA (Non-compliance with rule 21(4)) [2022] UKUT 00132. Headnote (4) states:

"4. If the grounds (in their final form) were not in existence by the expiry of the relevant deadline in rule 21(3), it would be an abuse of process or akin to an abuse of process for an applicant and/or his legal representatives to submit an application within the relevant deadline in the knowledge that rule 21(4)(e) cannot be complied with. The proper and correct approach in such cases is to make the application when it can be submitted with the grounds and, if necessary, request an extension of time."

19. SA had also cited R (Talpada) v SSHD [2018] EWCA Civ 841 and the need for procedural rigour, and the warning against 'evolving' grounds, as well as the relevant principles (at para [69] of SA):

"69. The principles to be applied in deciding whether time should be extended are well established. The leading authorities include the Court of Appeal's decisions in Mitchell v News Group Newspapers Ltd [2013] EWCA Civ 1537; Denton v White [2014] EWCA Civ 906, R (Hysaj) v Secretary of State for the Home Department [2014] EWCA Civ 1633 and NA (Bangladesh) v Secretary of State for the Home Department [2016] EWCA Civ 651; and the Upper Tribunal's decisions in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 60 (IAC); [2013] Imm AR 422 and R (Onowu) v First-tier Tribunal (Immigration and Asylum Chamber) (extension of time for appealing; principles) IJR [2016] UKUT 185 (IAC); [2016] Imm AR 822.

70. Paras 11-19 of the Presidential Guidance Note explain the relevant principles derived from the case-law. Para 14 explains the three- stage approach being as follows:

(i) Identifying and assessing the seriousness or significance of the failure to comply with the time limit. If a judge concludes that a breach is not serious or significant, then relief will usually be granted and it will usually be unnecessary to spend much time on the second or third stages; but if the judge decides that the breach is serious or significant, then the second and third stages assume greater importance.

(ii) Considering whether there is a good reason for the delay. If so, the judge will be likely to decide that relief should be granted. The important point made in Denton is that if there is a serious or significant breach and no good reason for the breach, this does not mean that the application for relief will automatically fail. It is necessary in every case to move to the third stage.

(iii) Evaluating all the circumstances of the case, so as to deal justly with the application. The need for litigation to be conducted efficiently and at proportionate cost is a particular factor. The substantive grounds will be relevant only if they are very strong or very weak.

20. Mr Georget submitted that, as per Ogundimu, a delay of more than 21 days was significant. As confirmed in para [16] of Ogundimu, the merits of an appeal cannot be decisive, for the reasons given in Boktor and Wanis (late application for permission) Egypt [2011] UKUT 442 (IAC). There was no real explanation for the delay. If the FtT had made an error of fact, the burden was on the Secretary od State to prove this, and she had attempted to adduce evidence in an informal way, with evidence appearing to be from a representative himself (Mr Whitwell).

21. While Mr Melvin could not provide a further explanation for the delay in relying on the additional ground, he reiterated that the error went to the FtT's jurisdiction, and even if the Claimant not sought to mislead the FtT, the reference to the section 120 'statement', contained in the FtT bundle, and had been the context for the FtT's confusion. The Secretary of State could not prove a negative, i.e. that a section 120 notice had not been served – the checks of her records completed were sufficient.

22. I reserved my decision. Following the hearing, and upon my further review of the documents provided, I issued directions on 28th November 2022, the relevant excerpt of which is as follows:

"1. Following the resumed hearing on 25th November 2022, the parties' written submissions are invited, to address the following additional points:

a. Whether the reasons of the Claimant's (Mr Gjera's) Counsel, which the FtT adopted, included an assertion that a section 120 notice had been served, including by reference to Counsel's skeleton argument to the FtT dated 27th May 2022?

b. If they did not, whether Counsel's reasons before the FtT (in particular, paragraphs [21] to [28]) are consistent with paragraphs [87] to [98] of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)?

c. If Counsel's reasons before the FtT are not consistent, whether there needs to be any further amendment application, for this Tribunal to consider the issue?

2. The parties are directed to file and serve any written submissions by 4pm on 14th December 2022. If they seek a further hearing, they are directed to request this at the same time, otherwise the Tribunal will determine any appeal (which may include any remaking) on the papers.

Reasons

By way of reassurance, no decision has been taken on whether the FtT erred in law. Having reviewed the papers following reservation the judgement, I have noted the following: the FtT referred to "the appellant having served a section 120 statement" (paragraph [11]), and also at paragraph [15] to "In relation to Article 8, if that is relevant, I adopt the reasoning of the Appellant's counsel."

I have reviewed the skeleton argument drafted by the Claimant's Counsel before the FtT, dated 27th May 2022. That argument does not appear to assert that a section 120 notice (as distinct from a statement) was ever served. Instead, the skeleton argument sought to distinguish Amirteymour and others (EEA appeals; human rights) [2015] UKUT 466. If that is the reasoning adopted by the FtT, which appears to assume the absence of a section 120 notice and instead to distinguish Amirteymour, the representatives are invited to make submissions on the consistency of that reasoning with the paragraphs [87] to [98] of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)."

23. The Secretary of State did not reply. Mr Georget, on behalf of the Secretary of State, did. Given the focussed brevity of the submissions, for which I am grateful, these are set out in full below:

a. Whether the reasons of the Claimant's (Mr Gjera's) Counsel, which the FtT adopted, included an assertion that a section 120 notice had been served, including by reference to Counsel's skeleton argument to the FtT dated 27th May 2022?

1. This author has not had sight of any note or record of proceedings, either from the Tribunal or counsel at the hearing, so is not in a position to comment or assist on what, if any, oral submissions or discussions took place at the hearing on the issue

of the s.120 notice. But it does not appear that specific reliance was made on the service of a s.120 statement in the written skeleton argument dated 27 May 2022.

2. *In either case, FG would submit that it is clear from the determination that the FtT relied specifically upon the s.120 notice issue in its decision. Indeed, at [11] the FtT makes that clear by including a note, of its own motion, stating "I should note that [FG] served a section 120 statement raising Article 8 family life and private life" at the precise point where the skeleton argument contends that the FtT has jurisdiction to consider article 8 matters. This author's reading of that interjection is to say that the FtT had the s.120 notice in mind when considering that jurisdictional question. It would follow that, even if no specific reliance was made by FG's counsel in written or oral submissions, the FtT nevertheless relied upon it as part of its reasoning, specifically on the jurisdictional question which is now being considered by this Tribunal.*

b. If they did not, whether Counsel's reasons before the FtT (in particular, paragraphs [21] to [28]) are consistent with paragraphs [87] to [98] of Celik (EU exit; marriage; human rights) [2022] UKUT 00220 (IAC)?

3. *FG's primary submission is that, because the FtT proceeded on the factual premise that a s.120 notice had been served, the issue of consent by the SSHD did not arise. That is consistent with the reasoning in both Celik and Batool: the Tribunal must consider a matter raised in such a statement pursuant to r.9(1) of the 2020 Regulations ([87] of Celik; [78] of Batool).*

4. *If FG is wrong about that, he would observe only that the tribunal in Celik does not appear from the face of the determination to have addressed all of the precise points made in the skeleton argument dated 27 May 2022, of which there are several. For example, the tribunal did not consider the interesting point raised at [33] that the SSHD ought in the first instance to have treated the application as a human rights claim, or at the very least considered whether or not it constituted a human rights claim, given the substance of the issues at play amounting to a claim within s.113 of the of the NIAA 2002 as interpreted by the courts: see R (Alighanbari) v SSHD [2013] EWHC 1818 (Admin) at [70]. That did not appear to be an issue upon which the tribunal in Celik heard any argument. Nor was the issue of the effect of the changes to the immigration rules highlighted at [23], nor the impact of s.7 of the 1998 Act raised at [24] onwards.*

c. If Counsel's reasons before the FtT are not consistent, whether there needs to be any further amendment application, for this Tribunal to consider the issue?

> 5. *It would appear from her amendment application dated 23 September 2022 at [17] that the SSHD has already specifically made the argument that the FtT's approach was inconsistent with [87] to [98] of Celik. FG is of the view that it already therefore forms part of the application to amend which is pending before this Tribunal and no further amendment application is necessary."*

Decision on whether to extend time to permit amendment

24. I accept Mr Georget's submission that the merits of an appeal cannot be determinative of whether to grant an application for an extension of time. If it were, that would negate the effectiveness of time limits. I need to consider the length of delay in the Secretary of State's application in relying on the new ground, in circumstances where permission had not been granted; the reasons for the delay; the merits of the appeal within the overall context; and the prejudice to the parties.

25. This has been a finely balanced decision. The delay between lodging the notice of appeal (21st June 2022) and the error of law hearing (14th September 2022) of 84 days is significant.

26. The Secretary of State accepts that in light of the retirement of the author of the original grounds of appeal that there is no explanation it can put forward for not having raised the issue of jurisdiction in the original grounds. I also accept that it is not a justification that the Claimant served his Rule 24 reply late, which itself referred to the Claimant having "*served a response to a s.120 notice raising article 8 ECHR*." It could well be that this is what prompted the Secretary of State's subsequent consideration of the section 120 issue but does not explain why the author of the grounds had not considered the FtT's reasoning in respect of article 8 at para [15]. I also conscious of the need for procedural rigour and the importance of time limits. I attach significant weight to the extent of the delay in the absence of good reason for that delay.

27. Turning to the question of prejudice, I bear in mind one hand that any prejudice to the Secretary of State is relatively minimal, and in the context that she is the author of her own misfortune. Of more significant weight is the prejudice of allowing an appeal to stand where the issue is whether the FtT had jurisdiction to decide the appeal at all.

28. I bear in mind the prejudice to the Claimant, if the consequence is that he would be likely that he would lose an appeal on an issue on which he had succeeded, because there was no jurisdiction to consider that issue. On the other hand, if the Secretary of State's appeal is successful on the basis of the Claimant had not made a human rights claim, any such claim may simply go through the usual process for consideration by the Secretary of State and if necessary, onwards to a First-tier Tribunal.

29. Whilst I reiterate that the merits of the ground are not determinative, I consider these in the context of the other factors set out above. The merits of the Secretary of State's grounds of appeal are compelling. The FtT allowed the Claimant's appeal on article 8 grounds. The issue is whether he had jurisdiction to do so. Given the Secretary of State's submission that there is nothing to indicate that she ever served a section 120 notice, and in the absence of any concrete submission to the contrary, of which there is nothing, the only safe conclusion is that no section 120 notice was ever served on the Claimant. The Secretary of State has checked her records, and cannot prove a negative. As Mr Georget himself submits in his response of 15th December 2022, the FtT had a section 120 notice in mind when considering the jurisdictional question. Whilst Mr George submits that as a consequence, the issue of the Secretary of State's consent did not arise and para [84] of Celik confirms that the Secretary of State must consider a human rights issue in these circumstances, all of that is based on the FtT's incorrect assumption that a section 120 notice had been issued. I had raised with the representatives in my directions of 28th November, whether, on closer review of the Claimant's Counsel's skeleton argument before the FtT, he had ever argued that the Secretary of State had served a section 120 notice, as opposed to the Claimant purporting to provide, unilaterally, a statement in response to a notice which had never been issued. As Mr Georget accepted, it seems that Counsel never submitted that a section 120 notice had been issued. Nevertheless, the FtT proceeded on the basis that one had. The FtT essentially conflated the two stages of the section 120 process (notice and reply). The materiality of that error is summarised by the Court of Appeal, in paras [38] to [40] of Amirteymour:

> *"38… Service of a notice under section 120 confers jurisdiction on the Tribunal in any appeal then on foot to deal with all claims made in response to the notice.*
>
> *39. No procedural unfairness to the Secretary of State arises from treating the Tribunal's jurisdiction as being expanded in this way. Such an expansion of jurisdiction only occurs when the Secretary of State or the relevant immigration official opts to serve a section 120 notice. By opting to serve such a notice they take the risk of an expansion of the claims to be addressed in existing proceedings in order to secure the benefit of being able to deal with all claims definitively and promptly in a single set of proceedings: see Patel v Secretary of State for the Home Department at [69] (Lord Mance JSC).*
>
> *40. Turning to the facts of the present case, no section 120 notice was served by the Secretary of State. Therefore, the jurisdiction which the FTT was required to exercise was the limited basic jurisdiction which arises under regulation 26(1), without any expansion by virtue of section 120 and section 85(2) of the 2002 Act and the related provisions of the EEA Regulations. Under the Tribunal's basic jurisdiction under regulation 26(1), the FTT had*

no power to entertain the appellant's new case based on Article 8."

30. While Mr Georget says that not all of the issues which the Claimant's Counsel had raised in his skeleton argument before the FtT had been considered or resolved in Celik, this is no answer to FtT's erroneous assumption of jurisdiction, based on a conflation of section 120 notice with a purported reply to a section 120 notice. The FtT's reference to the Claimant's Counsel's alternative reasoning does not resolve that error.

31. Having considered the significant delay in applying to amend the grounds; the absence of an adequate explanation for that delay; the prejudice to both parties and also the merits of the amended ground, I am satisfied that it is appropriate to allow the Secretary of State's application to extend time for the amended ground to be considered, and to allow that ground to proceed.

Conclusion on whether the FtT erred in law

32. I turn to the substance of the grounds. The Claimant already accepts that if I regard Celik as still good law, he cannot rely upon the Withdrawal Agreement or the Immigration Rules in order to succeed in an appeal under the Immigration (Citizens' Rights Appeals) (EU Exit) Regulations 2020. On the basis that Mr Georget was not able to advance any positive argument in response to the Secretary of State's appeal that Celik was wrongly decided, while Mr Georget wished to reserve the Claimant's position in the future, should he seek permission to appeal to the Court of Appeal (as to which, he developed no arguments), I see no reason not to apply Celik. There is no suggestion that the Claimant had applied for facilitated entry or residence before 11pm GMT on 31st December 2020 and in the circumstances, the FtT's analysis by reference to the Withdrawal Agreement was an error of law.

33. In respect of the FtT's reasons, which allowed the Claimant's appeal by reference to article 8 ECHR, there is no decision which engages article 8; no section 120 notice has been issued, and the Secretary of State has not consented to any new matter being considered. The FtT therefore erred in law, in allowing an appeal on the basis of which the Secretary of State had not reached a decision.

Disposal of the Claimant's appeal

34. I considered whether I should retain remaking in the Upper Tribunal or remit back to the First-tier Tribunal. I bore in mind paragraphs 7.2(a) and (b) of the Senior President's Practice Statements. The effect of the errors has not been to deprive either party of a fair hearing. Both outstanding bases of the Claimant's appeal can be decided without hearing further evidence. The Claimant's appeal under the 2020 Regulations falls to be dismissed because of Celik. There is no human rights decision on which an appeal can be remade.

35. In the circumstances, I apply the guidance in Celik and dismiss the Claimant's appeal under the 2020 Regulations. There is no basis for me to consider a human rights appeal. The Claimant's appeal under the 2020 Regulations therefore fails and is dismissed.

36. However, while dismissing the Claimant's appeal, I preserve the FtT's findings at para [13] that:

> *"… the Appellant arrived in the UK in November 2018. Monika Sych arrived in the UK in 2017. She is and has been exercising treaty rights as a Polish national in the UK at all relevant times and there is no challenge to that by the Respondent. She has pre-settled status. The Appellant and Ms Sych began their relationship in September 2019. The Appellant and Ms Sych have lived together in the UK since April 2020 and have been in a durable relationship since then. They became engaged in May 2020. They attended the Registry Office for their notice of marriage appointment on the 15 December 2020. Because of the Covid 19 restrictions the Appellant and Ms Sych were unable to marry until the 19 September 2021."*

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside, subject to preserving the FtT's findings as set out at para [36] of my reasons.

I remake the appeal by dismissing the Claimant's appeal.

No anonymity direction is made.

Signed J Keith Date: 23rd December 2022

Upper Tribunal Judge Keith